No. 95-44

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RICHARD C. BECHERER, et al.,

Cross-Petitioners,

v.

J. DON ADAMS, MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Steve W. Gaskins
(Counsel of Record)
Cosgrove, Flynn & Gaskins, P.L.L.P.
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 333-9500

Mary Cullen Yeager
Faegre & Benson
Professional Limited Liability Partnership
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 336-3000

Attorneys for Cross-Respondents Shelter Seagate Corporation, Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Arni C. Thorsteinson and Graham C. Lount

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

Whether the Petition should be denied because Petitioners do not seek review of the Court of Appeals' holding that Petitioners failed to provide evidence of fraud by any of the Respondents.

II.

Whether the Petition should be denied because the Court of Appeals' holding that Petitioners failed to produce evidence of fraud by any of the Respondents is not appropriate for review by this Court.

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COUNTER-STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

Respondents Shelter Seagate Corporation ("SSG"), Can-American Corporation, Can-American Realty Corporation, Arni C. Thorsteinson, Garrett G. Carlson, and Graham C. Lount ("SSG Respondents") adopt and incorporate herein the Questions Presented, the Counter-Statement of the Case and the Reasons for Denying the Writ as set forth by Merrill Lynch, Pierce, Fenner & Smith, Inc., Francis Lavin and Martin Cicco ("Merrill Lynch Respondents") in their Brief in Opposition to Cross-Petition for Writ of Certiorari served on September 6, 1995. This brief supplements but does not repeat the facts and arguments set forth in Merrill Lynch's brief.

II. BACKGROUND

The Registry Resort Hotel is an elaborate 474-room structure built on a fifteen-acre site in Pelican Bay, Florida, adjacent to the Gulf of Mexico. The hotel consists of a nineteen-story tower with 474 guest rooms, including a presidential suite, approximately 144,000 square feet of support facilities containing a variety of shops, three restaurants, a cocktail lounge, a health center, a 1,500-seat ballroom with stage and production capabilities, meeting rooms and a swimming pool. To the east of the tower are fourteen one- and two-story buildings containing fifty cabana guest houses, seven tennis courts, a pro shop, and yet another swimming pool. *Condé Nast Traveler Magazine* has regularly named the hotel one of the country's top twenty resort hotels. The hotel cost approximately $90

million to develop, build, and furnish. SSG was the hotel's developer.

Money was raised for the hotel's development and construction by selling interests in the hotel through a private placement exempt from registration under the securities laws pursuant to Regulation D. SSG was the issuer. Merrill Lynch was the exclusive selling agent. The offering closed into escrow on February 15, 1985. On that date, investors were irrevocably bound to pay for the hotel.[1] Construction of the hotel began shortly after the escrow closing. Once construction of the hotel was substantially complete, SSG was obligated to close the sale and transfer ownership of the hotel to investors. The closing of sale occurred on October 31, 1986.

When the hotel's investors determined it was not as profitable as expected and not the tax shelter envisioned, they commenced this class-action suit against nearly everyone that had anything to do with the development, design, construction, and financing of the hotel, alleging a myriad of claims including prolix allegations of fraud. After three years of litigation, including a trial on Petitioners' breach of contract claims, the District Court determined that Petitioners had failed to prove even a prima facia case of fraud against any of the Respondents. The District Court did find that SSG had breached its contract with Petitioners by leasing certain furniture, fixtures, and equipment ("FF&E") for the hotel.

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[1] *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 799 F. Supp. 755, 763 (E.D. Mich. 1992).

Petitioners asserted a fraud claim arising out of SSG's leasing of certain FF&E. The District Court dismissed this claim as well as all of Petitioners' other fraud claims. Petitioners assert before this Court that the District Court's dismissal of Petitioners' FF&E fraud claim deprived them of a "valuable property right" because they assert their claim had factual and legal merit. However, the District Court found, and the Court of Appeals affirmed, that Petitioners "have not provided any evidence of bad faith, as is necessary to support a fraud claim." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054, 1064 (6th Cir. 1995). Petitioners' failure of proof is not an issue appropriate for review by this Court.

III. FF&E LEASING

SSG leased two categories of FF&E for the hotel: (1) equipment commonly leased in the hotel industry including televisions and telephones; and (2) kitchen and laundry equipment in order to fund additions and improvements to the hotel which SSG believed were beyond its contractual obligation to provide, but which, as hotel agent, it believed was in the long-term best interests of the hotel. It was uncontroverted before the District Court that SSG believed that the contract documents gave it authority to lease both types of equipment. In fact, prior to leasing, SSG obtained opinions from two lawyers who, after reviewing the contract documents, determined that SSG had contract authority to lease.

The private placement memorandum ("PPM") disclosed the fact that SSG would lease a telephone and

television for each unit and would also lease FF&E for the common areas that were normally leased in the hotel industry.

> . . . [T]he AUO on behalf of each investor will lease a telephone and television set for his Hotel Unit from an independent lessor, and the lease payments will be common expenses.

(PPM at 25.)

> Hotel Agent [SSG] is authorized to rent equipment, furniture and furnishings, including, but not limited to, telephone equipment, front desk and office equipment and furniture, and computers, small appliances, interior plants, signage, TV satellite antennae, and billboards on behalf of all investors.

(PPM at 30.)

SSG also believed it had authority to execute a lease to fund additions and improvements to the hotel beyond that it was contractually obligated to provide, if it determined the additions and improvements were prudent.

The Agency Agreement, one of the contract documents executed by each investor, gave SSG specific authority to make necessary additions or improvements to the hotel. The Agency Agreement gave SSG the authority:

> . . . to make or install . . . *at the expense of the Owner, all necessary or desirable* repairs, decorations, renewals, revisions, alterations, rebuildings, replacements, *additions and improvements* in and to the Hotel.

(Agency Agreement, § 2.1(f) at F2, emphasis added) and,

> . . . to enter into leases on behalf of owner . . . with respect to equipment, furniture, furnishings and fixtures in the commercial unit upon such terms, provisions and conditions as hotel agent shall determine in the exercise of its prudent judgment.

(*Id.* at § 2.1(m) at F3.)

After the hotel's final architectural drawings, plans and specifications were in place and approved by the hotel's operator, after the closing into escrow occurred and investors were irrevocably bound to the purchase, and after construction of the hotel had begun, the Ritz Carlton Hotel, which was located near the Registry site, began operations. The hotel's operator urged SSG to add $2.5 million to the hotel's preopening budget and working capital, to build a $225,000 presidential suite, and to add almost $500,000 in other improvements and additions to the hotel's physical structure to enable the Registry to more effectively compete with the Ritz. SSG concluded that the suggestions were prudent. Accordingly, SSG added to the preopening budget and made the other requested additions and improvements to the physical structure. It entered into a $2.8 million lease with Mellon Bank to finance these additions and improvements.[2]

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[2] The evidence before the District Court was uncontroverted that, at the time of the escrow closing, SSG and Merrill Lynch believed that leasing would not be necessary. The Court of Appeals recognized that Petitioners never rebutted this proof. 43 F.3d at 1066.

The District Court found that SSG's FF&E leasing breached its contract with Petitioners. The District Court dismissed Petitioners' FF&E fraud claim, holding that Petitioners had been made whole by a $6.7 million damage award which included all of the lease payments, lost tax credits, and interest. 799 F. Supp. at 777. In deciding the measure of damages, the District Court found that there was no evidence of malicious, deliberate, willful or wanton fraud. *Id.* at 769. The District Court also found that "plaintiffs have not shown that defendants acted in bad faith, merely that they breached their contract." *Id.* at 776. The evidence before the District Court established that all leasing was done under the good faith belief that it was authorized by the contract.

IV. THE COURT OF APPEALS' HOLDINGS

The Court of Appeals made two holdings with respect to Petitioners' FF&E fraud claim against SSG and the other Respondents. The Court of Appeals held:

> The District Court awarded damages to plaintiffs under a breach of contract theory and found that these damages made plaintiffs whole. Plaintiffs, therefore, are not entitled to recover under any tort theory, as that would result in a windfall to plaintiffs. *In addition, plaintiffs have not provided any evidence of bad faith, as is necessary to support a fraud claim.*

43 F.3d at 1064 (emphasis added).

Thus, with respect to SSG, since contract damages and tort damages were the same, the Court of Appeals held there could be no double recovery. With respect to

the other Respondents, and as an additional basis for affirming the District Court as to SSG, the Court of Appeals held there was no evidence of scienter to support a fraud claim.

REASONS FOR DENYING THE WRIT

Petitioners contend that the District Court deprived them of the opportunity to pursue "cognizable"[3] tort claims against solvent Respondents after awarding contract damages against an insolvent corporation and that the Court of Appeals sanctioned this result. First, the Court of Appeals held that, as to SSG, Petitioners could not recover in both tort and contract where the measure of damages is the same, not that Petitioners could not seek judgment under both theories if they established the prima facie elements of their claim. Second, as to the other Respondents, the District Court's findings of fact establish, and the Court of Appeals held, that Petitioners failed to establish an essential element of their FF&E fraud claim – scienter.

The bottom line is that both the District Court and the Court of Appeals expressly found no fraud in this transaction.

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[3] The District Court expressly stated that Petitioners' FF&E fraud claim was not "cognizable."

I. ON THE RECORD BELOW, PETITIONERS FAILED TO ESTABLISH A PRIMA FACIE CASE OF FRAUD AGAINST SSG, ITS OFFICERS OR AFFILIATE CORPORATIONS.

Without intent to defraud, there is no fraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Iden v. Kasden*, 609 So.2d 54 (Fla. Dist. Ct. App. 1992), *review denied*, 620 So.2d 761 (Fla. 1993). The District Court and the Court of Appeals found this critical element of Petitioners' fraud claim missing. The District Court's and the Court of Appeals' opinions are replete with express findings relating to Petitioners' failure of proof.

A. The District Court Found No Fraud.

First, the District Court said, "[e]ven if the FFE fraud claim was cognizable, plaintiff class is not entitled to recision or punitive damages. . . . There is no evidence of malicious, deliberate, gross, or wanton fraud in this case."[4] 799 F. Supp. at 769.

Second, with respect to determining the measure of damages caused by the leasing, the District Court said: " . . . plaintiff class is not entitled to 'benefit of the bargain' damages, in any event. They have not shown that defendants acted in bad faith, merely that they breached their contract." *Id.* at 776.

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[4] The Cross-Petition's Appendix at App. 11 purports to contain the District Court's August 7, 1992, opinion reported at 799 F. Supp. 755, 769 (E.D. Mich. 1992). However, the first full paragraph reported at App. 36 omits the above-quoted language.

B. The Court of Appeals Found No Fraud.

First, in holding that the FF&E fraud claim against all Respondents had been properly dismissed, the Court of Appeals said: "[i]n addition, Petitioners have not provided any evidence of bad faith, as is necessary to support a fraud claim." 43 F.3d at 1064.

Second, the Court of Appeals held that the District Court erred in piercing the corporate veil and holding three of SSG's officers and two of SSG's affiliate corporations secondarily liable for SSG's breach. The Court of Appeals stated:

> [u]nder Florida law, the corporate veil may not be pierced unless it is shown not only that one business entity dominated or was the alter ego of the other, but that the relationship was created or used in order to mislead or defraud creditors.

Id. at 1064. In reversing the District Court, the Court of Appeals held that ***" . . . there is no evidence that SSG, its affiliates, or shareholders misled or defrauded plaintiffs."*** *Id.* at 1065 (emphasis added). Petitioners have not challenged this finding of no fraud nor have they challenged the Court of Appeals' holding exonerating SSG's officers and affiliate corporations.

Third, in discussing Petitioners' claim that Merrill Lynch breached its interim escrow duties, the Court of Appeals again discussed Petitioners' FF&E fraud claim stating:

> . . . we have reviewed the District Court's opinions in this case and find no discussion of when

> Merrill Lynch learned of SSG's intention to lease the disputed FF&E and whether Merrill Lynch thought that intention contravened the contract. Nor have the Becherer plaintiffs pointed to any part of the record to show they raised this argument below. We will not address it for the first time on appeal.
>
> Merrill Lynch points to evidence that it reduced its commission so that the project could be completed as promised and that it believed that, with these concessions, SSG could fulfill its end of the contract.
>
> We earlier addressed the Becherer plaintiffs' allegations regarding Merrill Lynch's projections and SSG's decision to lease FF&E. We will not repeat that discussion here, except to say the claim has no merit.

Id. at 1066.

In summary, the main reason the District Court dismissed the FF&E fraud claim was because Petitioners failed to establish even a prima facie case of fraud. Based on its review of an extensive 27-volume record, the Court of Appeals agreed. The Cross-Petition does not seek review of these findings and, in any event, the findings are not appropriate for review by this Court.

II. THE COURT OF APPEALS' HOLDING THAT, BECAUSE PETITIONERS HAD BEEN AWARDED CONTRACT DAMAGES, PETITIONERS ARE NOT ENTITLED TO RECOVER UNDER ANY TORT THEORY AGAINST SSG IS CONSISTENT WITH BLACK LETTER LAW.

Assuming that Petitioners had been able to establish a prima facie fraud claim against SSG, its officers or

affiliate corporations, Petitioners proved no damages beyond those supporting their breach of contract claim. It is well-settled that once contract damages have been awarded, Petitioners cannot recover damages in tort unless they allege and prove the existence of additional damages attributable *solely* to the tort. *See, e.g., Rosen v. Marlin*, 486 So.2d 623, *review denied*, 494 So.2d 1151 (Fla. Dist. Ct. App. 1986) (holding that where damages sought in tort are identical to damages sought for breach of contract, damages in tort are not recoverable); *Green Mountain Corp. v. Frink*, 604 So.2d 579 (Fla. Dist. Ct. App. 1992) (determining that plaintiff is not entitled to an independent award of damages for both defendant's fraud and breach of contract where damages sought on fraud claim were the same damages supporting the breach of contract claim); *Rolls v. Bliss & Nyitray, Inc.*, 408 So.2d 229 (Fla. Dist. Ct. App. 1981) (holding that plaintiffs failed to prove that they sustained compensatory damages based on fraud that were separate and distinguishable from compensatory damages based on contract and so failed to establish an essential element of their fraud claim – damages).[5] Even after a full bench trial on the

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[5] It is the law of the case that the contract is to be construed according to Florida law. 799 F. Supp. at 765. Application of the double recovery rule by the United States Circuit Courts is consistent with Florida law. *See, e.g., Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir. 1987) (holding that plaintiffs cannot recover the same damages twice, even though recovery is based on two different theories); *Mercer v. Davis & Berryman Int'l., Inc.*, 834 F.2d 922 (11th Cir. 1987) (reversing fraud damage award because plaintiff had also been awarded contract damages); *Greenwood Ranches, Inc. v. Skie Constr. Co.*, 629 F.2d 518 (8th Cir. 1980) (finding that plaintiff is entitled to only one

nature and extent of their damages, Petitioners failed to show any damages other than those arising from breach of the contract.

The one recovery ruling of the District Court as to SSG is consistent with Florida and federal law. For the reasons stated above and in the Merrill Lynch Respondents' brief, this holding is not appropriate for review.

CONCLUSION

The District Court and the Court of Appeals did not err, much less depart from the accepted and usual course of judicial proceedings, in dismissing Petitioners' FF&E fraud claim. For six years, Petitioners have continually asserted that this is a fraud case. Two courts have held that they failed to establish even a prima facie case of fraud. The dismissal of the FF&E fraud claim involved the standard application of well-settled law and two courts' repeated acknowledgement of Petitioners' failure of proof. This case involves no important question of

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compensatory damage award even if liability is found on multiple theories).

federal law, and Petitioners' application for a writ of certiorari should be denied.

Dated: September 13, 1995

Respectfully submitted,

STEVE W. GASKINS
(Counsel of Record)
Cosgrove, Flynn & Gaskins, P.L.L.P
333 South Seventh Street
Minneapolis, MN 55402
(612) 333-9500

MARY CULLEN YEAGER
FAEGRE & BENSON
Professional Limited Liability
Partnership
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 336-3000

Attorneys for Cross-Respondents Shelter Seagate Corporation, Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Arni C. Thorsteinson, and Graham C. Lount